

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

CAROLINE RICHARDSON,

Plaintiff,

v.

Civ. No. 08-818 MV/KBM

JANET NAPOLITANO, Secretary,
Department of Homeland Security,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendant's Motion for Summary Judgment (Doc. No. 24, filed August 20, 2009). For the reasons stated below, the Court will **DENY** the Motion without prejudice.

Background

Plaintiff is an Hispanic-American woman employed by the Department of Homeland Security at the United States Immigration and Customs Enforcement's District Office in El Paso, Texas. (*See* Complaint ¶ 1, Doc. No. 1, filed September 9, 2008). Plaintiff alleges that Defendant discriminated and retaliated against her because of her race, sex and national origin, her whistleblowing activities, and for having filed EEO complaints. (*See id.* ¶ 30).

Defendant's Motion for Summary Judgment

Defendant's Motion seeks summary judgment on Plaintiff's gender/national origin discrimination and retaliation claims using the pretext/burden shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973). (*See* Memorandum at 5-6). Under *McDonnell Douglas*, if the plaintiff establishes a *prima facie* case of discrimination or

retaliation, a presumption of discrimination or retaliation arises. (*See id.*). That presumption places upon the defendant the burden of articulating a legitimate, non-discriminatory reason for the adverse employment action. (*See id.*). If the defendant carries its burden of producing a legitimate, non-discriminatory reason, the burden then shifts back to the plaintiff, who must prove that the employer's reasons are a pretext for unlawful discrimination or retaliation. (*See id.*). Defendant argues that (1) Plaintiff has not established a *prima facie* case of discrimination or retaliation, (2) that Defendant has a legitimate, non-discriminatory explanation for its employment decisions, and (3) Plaintiff has failed to demonstrate pretext. (*See Memorandum at 6-14*).

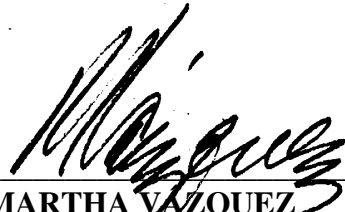
However, showing that the employer's reason for the adverse employment action is unworthy of belief is not a plaintiff's only way of establishing that discrimination or retaliation played a part in the employment decision. A plaintiff may prevail on a discrimination or retaliation claim by persuading the factfinder that the evidence shows discrimination or retaliation was a motivating factor in the employer's decision, in which case the evidence is analyzed within the mixed-motive framework. *See Fye v. Oklahoma Corp. Comm.*, 516 F.3d 1217, 1224-1225 (10th Cir. 2008). A "mixed-motive" case is one "where both legitimate and illegitimate reasons motivated the decision." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93 (2003). "Once the plaintiff proves that retaliatory animus was a motivating factor, the burden of persuasion shifts to the defendant to prove that it would have taken the same action absent the retaliatory motive." *Fye v. Oklahoma Corp. Comm.*, 516 F.3d at 1225.

Plaintiff asserts that hers is a mixed-motive case. (*See Response at 1, 3, and 8, Doc. No. 34, filed February 19, 2010*). Defendant did not address the mixed-motive framework in her memorandum in support of her Motion and, therefore, did not meet her initial burden of showing that she is entitled to summary judgment as a matter of law on Plaintiff's mixed-motive case.

Defendant addresses the mixed-motive framework in her reply brief, but Plaintiff has not had an opportunity to address Defendant's mixed-motive argument. The Court will deny Defendant's Motion without prejudice. Defendant may file another motion for summary judgment addressing the mixed-motive framework.

IT IS SO ORDERED.

Dated this 19th day of March, 2010.



MARTHA VAZQUEZ
CHIEF UNITED STATES DISTRICT JUDGE

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